IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.11.2007

CORAM

THE HONOURABLE MR. JUSTICE K. MOHAN RAM

CRIMINAL REVISION CASE NO.1742 OF 2007
AND
M.P.NO.1 OF 2007

Bharat Kashavlal Patel @
Arvind Gohel ... Petitioner/Accused No. 5

Vs.

State, rep. by Superintendent
of Police CBI
Chennai. ... Respondent/Complainant

Criminal Revision filed under Section 397 r/w 401 Cr.P.C. praying to call for the records and set aside the order dated 9.10.2007 in Crl.M.P.No.1688 of 2007 by the learned Additional Special Judge for CBI Cases, Chennai in C.C.No.2 of 2005.

For Petitioner : Mr. G.M.Syed Fasiuddin
For Respondent : Mr. N. Chandrasekaran
Special Public Prosecutor (CBI)

O R D E R

The petitioner is the fifth accused in C.C.No.2 of 2005 on the file of the learned Additional Special Judge for CBI Cases, Chennai. The trial in the above case has been commenced and admittedly so far 28 witnesses have been examined. At that stage, the prosecution filed a petition to receive certain documents as additional documents stating that the prosecution had already cited list witness No.20, G.Hanumantha Reddy, MRO, Nizamabad in this case and he had stated in his 161 statement that no such ration card was issued in the name of Shri Aravind Gohel and he further stated that he sent letter No.A1/527/2003 to the SP, CBI, ACB, Chennai and due to oversight, the above letter was not filed in this case along with the charge sheet even though the said fact was mentioned by the said witness in his 161 statement and copy of the 161 statement was already furnished to the accused.

2. The said petition was opposed by the petitioner herein inter alia contending that at the belated stage the CBI cannot be permitted to fill up the lacuna that was exposed during the cross

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examination and the prosecution should not be allowed to go on adding witnesses to fill up the lacuna as they like and they should not be permitted to produce the documents which are created at a belated stage. In support of the above said contentions, the learned counsel appearing for the petitioner in the counter itself has cited

(a) AIR 1991 SC 1346
(Mohanlal Shanji Sam Vs. Union of India)
(b) AIR 1979 SC 677 (SC)
(Mohd. Iqbal Ahmed Vs. State of AP)
(c) 2001 (4) RCR (Criminal) 589
(Mahendra Lal Das Vs. State of Bihar)

(d) 2002 (3) Crime 333
(Hari Singh Vs. State of Haryana (PJ Haryana High Court))
(e) 1981 Crl LJ NOC 3 (AP)
(Narayana Rao Vs. State of AP
(f) 1991 Excise Law Time
(Aboobakkar Vs. Customs Department)

3. But the learned Special Judge by a one line order allowed the petition namely, " Heard. Petition allowed." Being aggrieved by the said order, the petitioner has approached this Court by filing the above revision.

4. Heard Mr. G.M.Syed Fasiuddin, the learned counsel for the petitioner and Mr. N.Chandrasekaran, learned Special Public Prosecutor for CBI cases for the respondent.

5. The learned counsel for the petitioner vehemently contends that on the earlier two occasions, two similar petitions were filed and those two petitions were allowed and the witnesses were examined and when the case was adjourned for the examination of other witnesses, the present petition came to be filed and the same has been simply allowed by the learned Sessions Judge without application of mind and without even considering the objections raised by the petitioner and without even looking into the decisions relied upon by the petitioner. According to the learned counsel the impugned order being a non-speaking order is liable to be set aside.

6. Countering the said submissions, Mr.N.Chandrasekaran, learned Special Public Prosecutor (CBI) for the respondent relied upon the decision of the Apex Court in ZAHIRA HABIBULLA SHEIKH AND ANOTHER VS. STATE OF GUJARAT AND OTHERS reported in 2004 Supreme Court Cases (Cri) 999 and specifically, paragraphs 44 and 46 of the decision, which reads as follows:-

> " 44. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e., (i) giving a discretion to the Court to

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examine the witness at any stage, and (ii) the mandatory portion which compels the Court to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In Mohanlal vs. Union of India this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as, "any court", "at any stage", or "any enquiry or trial or other proceedings", "any person" and "any such person" clearly spells out that the section has expressed in the widest-possible terms and do not limit the discretion of the court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case, "essential" to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

45. ....

46. Ultimately, as noted above, ad nauseam the duty of the Court is to arrive at the truth and subserve the ends of justice. Section 311 of the Code does not confer on any party any right to examine, cross-examine and re-examine any witness. This is a power given to the court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Recourse may be had by courts to power under this section only for the purpose of discovering relevant facts or obtaining proper proof of

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such facts as are necessary to arrive at a just decision in the case."

7. The learned counsel for the respondent submits that Section 311 of Cr.P.C. gives power to the Court for the purpose of discovering relevant facts or obtaining proper proof of such facts as are necessary to arrive at a just decision in the case. He further submits that in the light of the law laid down by the Apex Court in the above decision the order passed by the learned Special Judge cannot be said to be erroneous.

8. I have carefully considered the above submissions made by the learned counsel on either side.

9. Though Section 311 is, in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which they should be exercised, that power is circumscribed by the principle that underlines Section 311, namely, evidence to be obtained should appear to the Court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the Court while exercising the power under this Section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties. Power to receive evidence in exercise of Section 311 of the Code could be exercised 'even if evidence on both sides is closed' and such jurisdiction of the Court is dictated by the exigency of the situation and fair play. The only factor which should govern the Court in exercise of powers under Section 311 should be whether such material is essential for the just decision of the case.

10. The impugned order of the learned Sessions Judge show clearly non-application of mind. The order is practically non-reasoned. The basic issue raised by the petitioner was that on earlier two occasions, two similar petitions were filed and the two petitions were allowed and the witnesses were examined and the present petition is a third petition came to be filed by the prosecution and the same has been filed only to fill up the lacuna and the prosecution should not be permitted to fill up the lacuna as they like. The further issue raised

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by the petitioner was that if at all the documents were in existence, the prosecution would have definitely filed it along with the charge sheet. The learned Sessions Judge has not at all considered the above said objections before disposing of the petition. Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The absence of reasons in a judicial order is ordinarily incongruous with a judicial performance.

11. Section 311 Cr.P.C. as laid down by the Hon'ble Apex Court does not confer on any party any right to examine, cross-examine and re-examine any witness. This is a power given to the court not to be merely exercised at the bidding of any one party/person but the powers conferred and discretion vested are to prevent any irretrievable or immeasurable damage to the cause of society, public interest and miscarriage of justice. Thus it is crystal clear that before exercising the power under Section 311 Cr.P.C. the Court should apply its judicial mind and consider the necessity to permit the summoning of the witnesses or marking of additional documents, which has not been produced before it already. In this case, the court below has not recorded any reasons for exercising its discretion in favour of the prosecution. Reasons, however brief they may be should have been recorded which woud have indicated as to why the learned Sessions Judge has exercised his discretion in favour of the prosecution or defence. Therefore, this Court is constrained to set aside the above said order with the following directions.

12. The learned Sessions Judge shall consider the petition filed by the respondent afresh in the light of the law laid down in Zahira Habibulla Sheikh and Another Vs. State of Gujarat and Others reported in 2004 SCC (Cri) 999 and in the light of the observations made herein above. The learned Sessions Judge shall hear both sides, consider the legal objections raised by the petitioner herein and make an endeavour to find out as to whether there is necessity to act in terms of Section 311 Cr.P.C. and whether examination of the witness and marking of the document in question will sub serve the cause of justice and thereafter pass necessary orders one way or the other.

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13. For the reasons stated above, the order of the learned Special Judge in Crl.M.P.No. 1688 of 2007, dated 09.10.2007 is set aside and the matter is remitted back for fresh disposal. The leaned Special Judge shall pass order afresh after hearing both sides, within a period of two weeks from the date of receipt of a copy of this order, to avoid further delay in the disposal of the case. It is made clear that this Court has not expressed any opinion on the merits of the case.

14. With the above observation and directions, the criminal revision petition is disposed of. Consequently, connected M.P. is closed.

kk/kb

Sd/
Asst. Registrar

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Sub Asst.Registrar

To

1. The Superintendent
   of Police CBI, Chennai.

2. The Additional Special Judge
   for CBI Cases, Chennai.

3. Mr. N. Chandrasekaran, Special Public Prosecutor (CBI)
   High Court, Madras.

4. The Section Officer, Criminal Section, High Court, Madras.

+ One cc to Mr. G.M. Syed Fasiuddin Advocate SR 69578

MS (co)
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